UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

REVERA HEALTH SYSTEMS d/b/a
MONTESANO HEALTH &
REHABILITATION CENTER

Employer

and

Cases 19-RC-15093 and
19-RC-15094

INTERNATIONAL ASSOCIATION
OF MACHINISTS & AEROSPACE
WORKERS, DISTRICT LODGE W-1,
AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned makes the following findings and conclusions.[1]

I. SUMMARY

Revera Health Systems d/b/a Montesano Health & Rehabilitation Center ("the Employer"), a Delaware corporation with a principal office in the State of Connecticut, operates a skilled nursing facility in Montesano, Washington which is engaged in the business of attending to long-term care and sub-acute care residents.

[1] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Machinists District Lodge W-1 ("Petitioner") filed the instant Petitions seeking to represent a unit of approximately 20 full-time and regular part-time Licensed Practical Nurses (19-RC-15094) and a unit of approximately 5 full-time and regular part-time Registered Nurses (19-RC-15093). The Employer, contrary to the Petitioner, contends that the Petitions should be dismissed because all Licensed Practical Nurses and Registered Nurses at issue herein are statutory supervisors under Section 2(11) of the Act.

Based on a careful review of the record evidence and the parties' contentions, arguments, and briefs, I conclude that the Registered Nurses and Licensed Practical Nurses are not statutory supervisors because they do not assign, responsibly direct, or discipline the Registered Nursing Assistants or Certified Nursing Assistants using independent judgment and because their role in evaluating the Aides is neither regular nor substantial.

Below, I have provided a section setting forth the record from the hearing in this matter. Following the "Record Evidence" section is my analysis of the applicable legal standards in this case and my conclusion. Finally, I have also set forth below details of the directed election, and the procedures for requesting review of this decision.

II. RECORD EVIDENCE[2]

A. The Employer's Operations

The Employer is a skilled nursing facility divided into 2 resident care units; long-term and sub-acute. Residents in the Long-Term Unit are expected to live at the facility for the duration of their life. Residents in the Sub-Acute Unit are expected to be at the facility long enough to recover from surgery or an illness and then return home.[3] There are about 60-75 long-term care residents and about 36 sub-acute care residents.

The highest authority at the facility is Teresa "Terry" Myers, the Administrator. She oversees all operations at the facility. Directly reporting to Myers is Steve Jay, the Director of Nursing. Reporting directly to Jay are Cheryl Reed, the MDS (Minimum Data Set) Coordinator; Patrice Perry, the Staff Development Coordinator; Sherri Martin, the Infection Control Nurse Manager; and both Resident Care Managers: Kim Byers (Long-Term Care Unit) and Linda

[2] The Employer presented the testimony of Teresa Myers, the Administrator; Kim Byers, the Long-Term Resident Care Unit Manager; Michael Ghislandi and Carrie Cummings, Certified Nursing Assistants; Gloria Griggs, a Licensed Practical Nurse; Patrice Perry, the Staff Development Coordinator; Linda Wilder, the Sub-Acute Resident Care Unit Manager; and Dianne Hart, a Regional Nurse Consultant. The Petitioner presented the testimony of Tammy Hill, Rebecca Knoll, and Lannette Habets, Licensed Practical Nurses; and Alex Favre, a Certified Nursing Assistant.

[3] Wilder, the Resident Care Manager for the Sub-Acute Unit, testified that there is no difference in the overseeing duties and authority of RN's and LPN's in either Unit.

Wilder (Sub-Acute Care Unit).[4] Byers and Wilder typically work from 8:00 a.m. to 5:00 p.m., Monday through Friday, although Myers noted that Byers shows up at the facility during the night shift to check on her staff at least once or twice a year, and Wilder does the same at least once a week. Byers testified that on an average day she leaves the facility at about 7:00 p.m., and that once every 3 months she works on a weekend day.

Reporting directly to both Resident Care Managers Byers and Wilder are the approximately 5 Registered Nurses and 20 Licensed Practical Nurses (hereinafter Nurses) at issue in these cases. Reporting directly to the Nurses are the Certified Nursing Assistants and Registered Nursing Assistants[5] (hereinafter Aides). Myers testified that both RN's and LPN's are Charge Nurses. Myers noted that although the Nurses have not been officially notified orally or in writing of the fact that they are Charge Nurses, "Charge Nurse" is a commonly used term in the nursing home industry, and that it is part of their job description, to be in "charge" of the Aides.

The Employer's Long-Term Care Unit is divided into 3 halls: A, B, and C. These halls are in turn subdivided into 5-6 sections (1-2 per hall). The Sub-Acute Care Unit is divided into 2 halls; A and B, which in turn are subdivided into a total of 3 sections. Hourly employees at the facility, including Nurses and Aides, work 3 types of shifts: day (6:00 a.m.-2:00 p.m.), evening (2:00 p.m.-10:00 p.m.), and night (10:00 a.m.-6:00 a.m.). The Long-Term Care Unit has 3 Nurses during day shift (1 per hall), 3 during evening shift (1 per hall), and 1 during night shift (1 for the entire Long-Term Care Unit). Those Nurses in turn oversee 5-6 Aides during day shift, 5-6 during evening shift, and 2-3 during night shift. The Sub-Acute Care Unit has 2 nurses during day shift (1 per hall), 2 nurses during evening shift (1 per hall), and one Nurse during night shift (1 for the entire Sub-Acute Care Unit). Those Nurses in turn oversee 2-4 aides during the day shift, 2-4 aides during the evening shift, and 2 aides during the night shift.

The parties stipulated at the hearing that the job description of Nurses does not vary depending on whether the Nurse is a RN or a LPN. Similarly, the record indicates that the job duties of Aides do not vary depending on whether the Nurse Aide is a CNA or a RNA.

[4] The parties stipulated at the hearing that Cheryl Reed, Steve Jay, Linda Wilder, Kim Byers, Sheri Martin, and Patrice Perry are supervisors under Section 2(11) of the Act because they have the authority to hire, fire, suspend, discipline or discharge the employees who report to them. Accordingly, they will be excluded from any appropriate unit.

[5] Also referred to in the record as Nurse Aides Certified and Nurse Aides Registered, respectively.

B. Relevant Supervisory Criteria

1. Evaluations

The Employer conducts annual evaluations of Nurses and Aides using evaluations where the employee is scored on the performance of his or her duties.[6] For each duty, the evaluator checks a box showing that employee as "Excellent", "Good", "Fair", or "Poor." On the final section of the evaluation, duties are grouped into categories. The most prevalent mark in each category is then converted into a numerical value (ranging from three for an "Excellent" to zero for a "Poor") and becomes the score for that category. For example, if an Aide has 15 "Excellent" marks and 6 "Good" marks in the duties under one of the categories, that Aide would get a 3 in that category because Excellent was the most prevalent mark. At the end, the numerical average of all categories is computed, and that number determines the percentage of annual wage increase for that employee.[7] Myers testified that the Staffing Coordinator is the person in charge of controlling Attendance and making sure that the evaluator has the correct data for that category. Perry, the Staff Development Coordinator, testified that she does portions of the annual evaluation, like the duty of attending in-service (professional development) sessions, and that she takes that information directly to whoever is doing the evaluation.

After an evaluation is completed, the evaluator asks the employee being evaluated for his comments and signature, and the employee receives a copy of the evaluation. The next step for the evaluator is to turn the evaluation in to the Department Manager (for Nurses and Aides it would be the Director of Nursing). The resulting percentage of wage increase from the evaluation is then transferred into a Personnel Action Form,[8] a separate document which records and memorializes the wage increase. Myers testified that evaluation packets and Personnel Action Forms are signed and approved by the Department Manager first and later by her.

Myers testified that Unit Managers likely do most of the Aides' annual evaluations, although she added that they do so with the counsel of the Nurses who work directly with the Aides. Myers noted that Wilder, the Sub-Acute Unit Manager, typically delegates evaluations to her Nurses. Wilder testified that the only time in which she would conduct an annual evaluation herself would be if the evaluation was due immediately and a Nurse that worked with the Aide was not readily available. On the other hand, Byers, the Long-Term Unit Manager, testified that she would give an evaluation to a Nurse to complete if Byers did not

[6] The Aides' evaluations contain 45 checkboxes, one for each duty required by their position. In turn, the Nurses' evaluations contain 66 checkboxes for their duties.

[7] Until March 2008, the maximum percentage of wage increase allowed by these evaluation packets was 4.00%. Since then, the maximum percentage has been reduced to 3.00% in an effort to control corporate costs.

[8] Personnel Action Forms are also used to record wage increases due to transfers (e.g. from Nursing Aide to Restorative Aide), as well as hires and terminations.

work at all with that Aide. However, Byers noted that she usually does the evaluations herself because they are very time consuming and Byers does not want to burden the Nurses. In addition, Byers stated that she is aware enough of the quality of the work of the Aides to do the evaluations herself.

The record contains 16 annual evaluations of Aides performed by Nurses. Although the record is unclear as to the total number of annual evaluations of Aides done by management over the same period, I note that there are about 58 Aides employed at the Employer's facility.[9] Significantly, Myers testified that the Employer attempted to present at the hearing all the annual evaluations of Aides done by Nurses over the past 2 years. Six of the 16 evaluations were done by Martin, the Employer's current Infection Control Manager. However Myers testified that those evaluations were done during the time in which Martin was working as a Nurse. The remaining annual evaluations in the record were done by Nurses working a variety of shifts, including the night and weekend shifts.

Myers testified that the Director of Nursing, in conjunction with herself and corporate Human Resources, could override an evaluation, although she noted that this would be an extreme situation. Myers noted that if she wanted to give an employee a wage increase (or decrease) different from what the annual evaluation indicated, she would have to send the Personnel Action Form to her boss, the Regional VP of Operations. However Myers could not recall any recent occasion in which an employee received a percentage wage increase different from what the evaluation indicated.

Wilder testified that sometimes she looks over the evaluations performed by Nurses to see how the Aide is doing (but not to correct an evaluation), and then signs and sends the evaluations to the Director of Nursing. Wilder testified that whenever Nurses do annual evaluations of Aides, they do so using their own judgment and without having Wilder telling them what to put down. Wilder could not recall a time in which anyone had changed a Nurse's evaluation marks.

Byers testified that Nurses have the ability and authority to evaluate Aides using their own personal, uninfluenced judgment. Byers noted that the annual evaluations of Nurses include a section in which they are scored on their assistance in documenting and evaluating selected competencies of their assigned staff. Byers testified that when Nurses evaluate Aides, they are given the evaluation packet from a Unit Manager like herself or the Director of Nursing. Myers testified that Nurses don't have direct access to personnel files, and that they would have to go through her or the Director of Nursing in order to obtain them. Myers also testified that the evaluating Nurse would only know the resulting percentage of wage increase, but not an actual dollar figure.

[9] I take administrative notice of the election tally (dated May 30, 2008) in Case 19-RC-15085, a petition covering the Employer's Aides and excluding all other employees, which shows approximately 58 Aides as eligible voters.

Tammy Hill is a day shift Nurse (LPN) in the Long-Term Care Unit. Hill has been with the Employer for about 4 or 5 years. Hill testified that she has done 4 or 5 evaluations of Aides during that time, whenever asked to do one by her Unit Manager or Perry. Hill noted that she checked the boxes to evaluate the duties and responsibilities of Aides, but that she never filled out the final section which included an evaluation of attendance or the numerical grid where the final wage increase was computed. Hill said that she had no access to employee records or discipline records. Hill testified that after completing the section of the evaluations she is asked to do, she never sees those evaluations again, and that she did not know if management made any changes to her checkmarks. Hill noted that she filled out evaluations using her own judgment and that no one had told her what to write. At the hearing, Hill identified an evaluation she had done for Aide Carrie Cummings in August 2005, although Hill noted that she had not completed the section on attendance or the section where the percentage wage increase was computed. Hill also testified that when she fills out evaluations, she might leave a check box empty if the category appears unclear, but that then she would fill it out after talking to her Unit Manager for clarification.

Rebecca Knoll is an evening shift Nurse (LPN) in both the Long-Term and Sub-Acute Care Units. Knoll has been with the Employer for about 3 years. Knoll testified that she did fewer than 5 evaluations of Aides during that time, and had done them whenever asked by her Unit Manager of the Director of Nursing. Like Hill, Knoll testified that she did the section of the evaluation with the boxes to score the duties and responsibilities of Aides, but that she did not complete the last section on work attendance, in-service sessions attendance, or the grid where the wage increase was computed, and that she did not know whether her evaluations or checkmarks were changed after she turned in the evaluation. Also like Hill, Knoll identified her checkmarks on an evaluation she had done for Aide Sadie Pullar in September 2006, however Knoll noted that she had not done the section on attendance or the section where the percentage wage increase was computed.

Other Nurses testified that they had never performed evaluations of Aides. Lannette Habets is a Nurse (LPN) who works all shifts in the Sub-Acute Care Unit. Habets has been with the Employer for 6 and half years. Habets testified that she had never done any annual evaluations for the Employer. Gloria Griggs is an evening Nurse (LPN) in the Sub-Acute Unit. Griggs has been with the Employer for about 4 years. Griggs testified that she did not think she had ever done an annual evaluation of an Aide.

Some of the Employer's witnesses testified that, in addition to actually doing an annual evaluation, Nurses could also indirectly affect Aides' evaluations through previous feedback provided to management, or through the issuance of discipline which could affect the score in an annual evaluation category. With regard to feedback, Byers noted that she places significant weight on any feedback received from the Nurses, and she said that any feedback provided by

Nurses on a particular Aide could impact Byers' scoring of an Aide's evaluation. Byers added, however, that she did not rely on the opinion of any one specific Nurse, and instead she would ask other Nurses or Aides before filling out the evaluation. Myers testified that Nurses consult with other Nurses when conducting evaluations of Aides, especially if that Aide has worked over a cross-section of multiple shifts and Nurses. Griggs testified that she provided feedback to her Unit Manager as to how the Aides reporting to Griggs were doing, adding that she assumed that this feedback would be used by Unit Managers when they did annual evaluations.

With regard to disciplinary warnings affecting annual evaluations, Myers testified that oral warnings have the potential to affect the pay rate of an Aide because if the person doing the evaluation had knowledge that the Aide had received oral warnings, then that Aide would likely not receive an "Excellent" grade in the category related to the warning. Myers added that although all oral warnings should be documented in the employee files, some are not. Myers also said that if an evaluating Nurse knew that an Aide had written warnings, it would still be up to that Nurse's discretion to give that Aide an "Excellent," adding that if the Nurse could convince her that the Aide deserved an "Excellent," Myers would stand by the decision of her Nurse.

In addition to annual evaluations, the Employer, through Perry, the Staff Development Coordinator, also audits the skills of Nurses and Aides on an annual basis to ensure that they are up to State and Employer's standards. Skill audits are separate and different from the annual evaluations. Regarding the audits of the skills of Aides (e.g. bathing techniques, taking of vital signs, etc), Perry testified that she completes about half of them, and the other half are performed by Nurses (following a request by Perry) who work closely with the Aides. Perry said that if an Aide did not show sufficient skill on an audit category, that Aide would receive on the spot one-on-one education, which would be written down in the audit sheet by the auditor, and then the sheet would be signed by both the auditor and the Aide. The record contains no evidence showing the impact of these audits on the wages or tenure of the Aides.

2. Assignment & Responsibly Direct

a. Assignment of Significant Overall Duties

Each resident in the facility has a Care Plan chart which includes information such as that resident's diet, whether the resident is ambulatory or needs lifting assistance, and the type of medication a resident is taking, including the need to watch for any adverse effects. A Care Plan is created through a resident assessment period started when residents are first admitted. Hill testified that Care Plans are created through a collaborative effort of Nurses, Physicians, Dieticians, and Physical Therapy. Hill noted that a Nurse's contribution to the Care Plan includes a skin assessment when a resident is first

admitted, and an early determination of that resident's mobility level and mental acuity. Hill testified that she made sure that Aides followed the Care Plan to the best of their abilities. Griggs testified that the Care Plans she created usually notified the Aides that a resident was under a specific medication, and to look out for and report any symptoms of adverse effects. Byers testified that the Care Plan reflects the duties of the Nurses and Aides with respect to each resident, and that it was a Nurse's duty to make sure that it was being followed by the Aides.

Care Plans are maintained and changed by the Nurses who care for a resident, sometimes following orders from other departments if necessary. Hill testified that for example, if a resident was showing problems with mobility, she would call the Physical Therapy department so that they could assess whether a change to the Care Plan was necessary. Byers testified that if a resident was having problems with bearing weight, a Nurse would make the decision to update the Care Plan to show that such resident needed the help of a lift in the future. Byers noted that a lot of the changes to the Care Plan result from a Nurse's judgment and that a physician may or may not be notified, depending on the circumstances. Byers testified that whenever there is a change to a resident's condition, the Nurses have to update the Care Plan, because it instructs all caregivers, including Nurses and Aides, of any changes in treatment. Byers also testified that Nurses perform changes to these Care Plans without consulting with her. For example, Byers testified that a Nurse could write down information regarding a possible respiratory infection and that would inform all caregivers to be on the alert for any symptoms of respiratory infection, to determine the need to call a physician.

The Care Plan information is also copied into the Activities of Daily Living chart. Each resident has a unique "Activities of Daily Living" chart, which is specifically aimed at the Aides and which tells them, in simple lay terms, the type of care needed by that resident. Michael Ghislandi, an Aide (CNA), testified that it is his duty as an Aide to keep up with the Activities of Daily Living. Aides have to put their initials next to each scheduled activity for each resident, after that activity is completed. Byers testified that changes to the Activities of Daily Living chart are done by Nurses. Byers added that Nurses do so independently, without checking with management.

In addition, each Nurse has a "vitals sheet" which Aides working in that Nurse's hall must review at the beginning of their shift and is to be filled out before the end of their shift. This vitals sheet has the names of the residents in that hall. The Nurse highlights which vitals signs (blood pressure, pulse, respiration, and/or temperature) need to be taken from those residents before the end of the day. A "star" on a vitals sheet indicates that that resident's vitals need to be done immediately, usually in cases in which a resident is on hypertension medication, and the Nurse would need to know that resident's blood pressure before administering the medication.

With regard to interactions, Byers testified that Nurses and Aides work as a team. Nurses oversee the work of the Aides and, among other things, give medications to the residents, perform resident's skin checks and some medical treatments. Aides do all the hands-on care of the residents at the Employer's facility. These duties include, among other things, bathing the residents, taking them to the bathroom, feeding them, and taking their vital signs. Cummings, an Aide (CNA) working mainly in the Long-Term Care Unit, testified that whether it is an item such as a resident bath or the taking of a vital, she already knows how to perform these tasks, which she described as repetitive, noting however, that on some days she might be doing more baths and on others more showers. Knoll testified that Aides learn their skills at the classes they took before becoming certified or licensed as Aides. Aides can not give medications to residents or perform medical treatments. Myers testified that the work of the Aides is routine, and that if they notice any changes in the condition of a resident they tell the Nurse to allow the Nurse to determine if the change reflects a problem that has to be reported to a higher authority. For example, if an Aide reports to a Nurse that a resident ate too much or too little, the Nurse could determine that the situation was still within an ideal range of food intake.

Habets testified that it is her responsibility as a Nurse to somewhat monitor the workload and see where Nurses and Aides are needed. Habets testified that she interacts with Aides on and off throughout her shift. Habets also testified that around the beginning of her daily shift, she would find her Aides and inform them of what to watch for during the day, for example to make sure that a particular resident on intravenous medication continued to receive the medication on the vein, and not around it. Habets said that during her daily routine, she also performs treatments like the packing and irrigation of open wounds, and intravenous dressing changes. Habets testified that these treatments can only be performed by Nurses, but not by Aides. Habets said that Nurses are also in charge of processing the paperwork for newly admitted residents and residents being discharged. Habets testified that on the weekends, Nurses perform the entire process of new resident's admittance, while during the weekdays Nurses only do tasks like skin checks of newly admitted residents.

Habets also testified that Aides report to her usually all day long, whenever they see an issue like a new skin tear on a resident. Habets testified that in those cases, even though she knew what treatment to follow based on experience, she would still have to consult with a physician about treatment. Habets also testified that if for example a resident had a temperature, she would instruct Aides to put washrags on the resident's forehead. On the other hand, Habets would have to call the physician before giving a resident fever medication, because the physician might order a blood test before administering any medication. Habets added that she usually goes to the Aides for help performing a task whenever she has assessments or treatments to perform.

Habets also noted that sometimes, if the Aide didn't have the time, Habets would have to ask another Nurse or Aide, or wait until the Aide was available.

With regard to understaffing, Habets testified that Aides would usually work out coverage issues among themselves, and if this wasn't possible, then she usually would confer with her Aides to try to work out a solution. Habets said that she preferred this collaborative approach, but she noted that other Nurses preferred telling Aides what to do and Nurses had the authority to do so. Habets identified an occasion in which she only had 2 Aides scheduled from her section, and one of them was new and inexperienced. Habets testified that she had to make a judgment of the situation and, after getting together with the Aides and Nurses, shifted people around, having the experienced Aide working alongside the inexperienced one, while Habets had to work as the second Aide in her section. Habets testified that she also had to ask another Nurse to pass out her resident medications. Habets reiterated that although such collaborative approach to a coverage issue was her preference, other Nurses had different styles, telling people what to do rather than asking, and that a Nurse had the authority to do so.

Knoll testified that, occasionally, she assigns male Aides to residents who are difficult or heavy transfers.

Cummings testified that if an Aide falls behind on assigned tasks, all other Aides in that section work together to help that Aide complete the task, without a Nurse having to ask for it. On the other hand, on an uneventful day, Cummings testified that she would still have to chart and report information to the Nurse, although mainly just vital signs. Cummings also testified that she had no tasks for which she needed a Nurse's direct direction and observation.

Ghislandi testified that if he is just starting his shift, and an Aide from the ending shift tells him that a resident still needed some small task to be performed, he would usually take care of it without notifying a Nurse. However, Ghislandi noted that if it was something major, then a Nurse had to be notified. In turn, Cummings testified that whenever an unusual situation arose, she notified a Nurse immediately, noting a recent example in which a resident's bathroom needs had not been attended to by the Aides in the previous shift. Cummings said that she promptly informed her Nurse before proceeding to take care of that resident. Habets testified that at the beginning of a shift, Aides usually get informal reports from the Aides ending their shifts, regarding residents' issues that need to be closely watched, like for example a resident with a recent stroke who is unable to communicate. Habets testified that Aides do this reporting without being instructed by the Nurses to do so.

b. Assignment to a Place

The Employer has a daily schedule,[10] generated by management, listing which Nurses and Aides are scheduled to work that day. This daily schedule assigns employees to a specified hall.

Assignment sheets are then created each day based on the number of Aides shown on the daily schedule. Assignment sheets are pre-printed blank forms which indicate among other things, which section an Aide is assigned for the day, which Nurse is overseeing that section, and items that particular residents require on that specific day such as bath and showers. The assignment sheet is filled out by writing the name of an Aide next to the corresponding room assignment. However, there are many versions of assignment sheets, based on different levels of staffing, and if, for example, a unit was understaffed on that day, a different assignment sheet would be used, one with a greater number of room assignments for each Aide pre-printed on it. Knoll testified that, if she found out that she was understaffed after her shift had already begun, she, along with other Nurses, would switch to another assignment sheet, one with a higher number of rooms per Aide. Knoll added that in doing this, she would consider for example assigning a male Aide to a resident who is a difficult or heavy transfer, and that she also would try to avoid switching Aides from one hall to another.

Cummings testified that the assignment sheet is done by a Nurse every morning. On the other hand, Alex Favre, an evening shift Aide, testified that assignment sheets were typically done by Aides. Hill testified that assignment sheets are sometimes done by a member of management, sometimes by Nurses, and sometimes by Aides. Hill added that when Aides do the assignment sheet, they use criteria such as continuity of care.

With regard to changes to the tasks specified in the assignment sheets, Byers testified that if an Aide could not perform a task assigned to that Aide through the assignment sheet, a Nurse can either ask other Aides to see who can do it, or the Nurse can simply assign an Aide to do it, following some guidelines of fairness. Hill testified that in situations involving a resident not being happy with the assigned Aides, she would tell her Aides that perhaps they should trade rooms. Hill added that if Aides were doing the assignment sheet and a dispute arose over the assignments, a Nurse would assess the problem and try to work it out with the Aides, although Hill noted that she could not recall a dispute like that. Hill explained that Aides are well aware of the various needs of the residents, and they usually distribute assignments among themselves on their own.

[10] Also referred to by some witnesses as the Staffing Book.

c. Assignment to a Time

Byers testified that Nurses are authorized to approve overtime and to ask an Aide to work past the end of that Aide's shift. Byers also testified that if an employee forgets to punch in or out, a Nurse can approve a form called an edit slip to fix the omission. Byers testified that Nurses approve these edit slips frequently on the weekends and at night, when members of management are not present. Byers also testified that Nurses can also sign off on missed lunch breaks, which would allow the Aide to get paid for his/her unused lunch break. However, Byers noted that if a Nurse was aware that an Aide could not take a lunch break, a Nurse could do many things to help that Aide, as for example working that Aide's assignment herself. Byers testified, however, that some missed lunches are approved after the fact, and she also said that from looking at an approved missed lunch slip,[11] it was not possible to know whether it had been approved before or after the missed lunch.

Byers also testified that if somebody scheduled to work calls in, Nurses start calling people at their homes to come in as replacements because Nurses are responsible to staff their floor and to meet State and Employer standards. Byers added that Nurses are authorized to request people come in to work, even if they have already worked five days that week.

Wilder testified that Nurses have the authority to sign an edit slip attesting to the fact that an Aide has stayed beyond her scheduled shift, but she noted that Nurses did not assign overtime. Wilder added that Nurses use their own judgment to determine if a patient's needs would require an Aide to stay beyond her scheduled shift.

Hill testified that she signs edit slips in order to attest to the fact the Aide had missed a lunch. Hill also testified that Aides fill out their own slips, and they only bring the forms to the Nurses for their signature. Regarding overtime, Hill testified that she could not have people work overtime, and that she had to call management and ask if a particular Aide could stay over.

Knoll testified she always sends edit slips to Byers for her signature if Byers is available. Knoll also said, however, that a majority of times, Byers is not available, and in these cases Knoll signed the edit slip. Knoll also said that edit slips are brought up to her after the fact of the missed lunch, because edit slips are generally signed at the end of the shift. However, Knoll also said that she is sometimes aware that an Aide will miss a lunch break from the beginning of the shift, just by looking at the daily schedule and realizing that her shift will be short of Aides. Knoll also added that sometimes, even if an Aide has already communicated to Knoll that the Aide is not going to be able to take a lunch break, Knoll still finds another Aide to give the first Aide a lunch break, or that

[11] Before June 2007, all time clock corrections, including missed meals, had to be reported using edit slips. Since that date, the Employer has utilized separate slips specifically for missed meals.

sometimes she watches over that Aide's residents herself. Knoll testified that sometimes she asks Aides to stay for about 20 minutes after their scheduled shifts in order to help if the next shift is short of people, although she noted that if an Aide did not want to stay, she had no authority to make them stay and they could just go home. Knoll also testified that whenever she made such a request she had no way of knowing if that Aide would be working overtime since overtime is only computed after 40 hours a week. Knoll testified that she has no access to any records indicating how many hours a particular Aide has worked that week.

Habets testified that usually, edit slips are brought up to her after the fact of the missed meal, at the end of the shift. Regarding missed meals, Habets testified that since Aides take their lunch breaks whenever they can, they would not know whether they were going to miss their lunch until towards the end of the shift. Regarding overtime, Habets testified that although she is not aware that she has any authority to authorize overtime, she often asks Aides to stay past their shift in order to take care of the needs of the residents, for example in cases in which they are understaffed.

d. Responsibly Direct

Myers testified that Nurses have to oversee the work of the Aides because it is one of the requirements of the position. Myers testified that this requirement is reflected in the annual performance evaluation forms used to evaluate Nurses, and that a low score in the overseeing/supervisory category could negatively impact a Nurse's evaluation score with the consequence that such Nurse would not get the maximum possible wage increase. At the hearing, the Employer introduced annual evaluations of Nurses, in which the evaluator scored and commented on the Nurse's ability to oversee the day-to-day functions of Aides. For one particular evaluation, Byers testified that a Nurse had received an Excellent mark for her supervision skills because that Nurse made sure that Aides were doing their jobs, and Byers did not have to pay much attention to the Aides reporting to that Nurse. Byers also testified regarding the evaluation of another Nurse who was in need of improvement in supervision skills. Regarding that Nurse, Byers testified that on one occasion, that Nurse had failed to write down in a resident's Care Plan and Activities of Daily Living chart that the resident needed to be sitting on a particular type of cushion due to a risk of skin problems, and as a consequence of that failure, the Aide had failed to properly seat the resident on the right cushion. Byers added that she noted on that Nurses' evaluation that if her performance on overseeing the Aides did not improve, she would be written up.

Byers also testified about the evaluation of a Nurse scored as having excellent supervision skills. Byers noted that, for instance, that particular Nurse did not have residents fall in her section, her residents did not have pressure ulcers, and Byers did not have complaints from Aides regarding that Nurse because in general that Nurse got along very well with the Aides. Byers noted

that she had witnessed that Nurse giving an Aide a simple verbal counseling and she recalled being impressed with the verbal counseling provided to that Aide. Hill identified her own evaluation and testified that she had overseen her Aides as her evaluation indicated. Knoll also identified her own evaluation and testified that, as her evaluation indicated, she oversaw her Aides, that she kept track of what her Aides were doing, and that her Aides reported to her on any changes in the residents.

Ghislandi testified that his overseeing Nurse would be ultimately responsible for him getting his job done, although he provided no specific examples of adverse consequences falling on a Nurse if Ghislandi did not get his job done. Cummings also testified that a Nurse would be ultimately responsible for Cummings following a resident's Care Plan, however Cummings provided no examples of specific adverse consequences falling on a Nurse if this did not occur.

3. Discipline

The Petitioner introduced at the hearing a document titled "Employee Handbook of Personnel Policies and Procedures - Washington" (2007) and a document titled "Personnel Management Disciplinary Action" (2005). Both documents contain a section covering disciplinary actions. The record is unclear as to which of these documents currently applies to the employees of the Employer, however both documents are similar with regard to disciplinary policy. Both documents state that "it is each Employee's responsibility to report (to their Supervisor) violations of policies, procedures, and other work rules, safety regulations, resident abuse, or any other behavior that would endanger residents or other employees." The Personnel Management Disciplinary Action further adds that if the violation is not a serious offense, the Supervisor and/or Department Head shall:

- "speak with the reporter and any other personnel who may have witnessed or documented the incident,
- speak with the Employee, and,
- prepare a written report documenting the
    - nature of the violation, and date(s)
    - person(s) spoken with, and date(s)
    - determination of whether or not the allegation has been substantiated."

The Personnel Management Disciplinary Action then provides steps to follow based on whether the allegation has been substantiated to the Employer's satisfaction, or not.

Both the Personnel Management Disciplinary Action and the Employee Handbook of Personnel Policies and Procedures - Washington lay out the

process of progressive discipline: Verbal Warning, Written Warning, Written Warning with Suspension, and Termination of Employment. However, both documents also state that such policy may not necessarily be followed at all times. The Personnel Management Disciplinary Action also provides a copy of a Disciplinary Action form. This form contains a section named "Disciplinary Action Taken" which provides 5 boxes that can be checked: Discussion/Coaching, Written Warning, Verbal Warning, Written Warning with Suspension, and Termination. Several examples of these completed forms were introduced by both Petitioner and Employer.

In addition to Disciplinary Action forms, examples of a new, more recent disciplinary form titled "Employee Performance Improvement Notification" were also introduced at the hearing.[12] This new disciplinary form provides a different set of choices regarding disciplinary action taken (Verbal Warning, Written Warning, Final Written Warning, Suspension Pending Investigation, and Discharge) and a section where the work rule violation(s) (to be chosen from a list of 25 violations pre-printed on the back of the form) is written down.

Myers, Byers, and Wilder testified that Nurses have the authority to discipline Aides. Myers testified that oral warnings[13] are considered part of the Employer's disciplinary process. Byers testified that the oral counseling provided to the Aides by the Nurses sometimes is reflected as a written warning, while sometimes it remains just oral. Byers said that oral counseling involves a Nurse telling an Aide what is being done wrong and how to correct it. Byers testified that for errors that are not likely to harm a resident, it is up to a Nurses' discretion to decide whether to use oral counseling versus written counseling. Byers noted that in cases in which the wrongful conduct is being repeated enough times, it is also up to a Nurses' discretion to decide whether an oral counseling is sufficient, or whether to memorialize the oral counseling in written form. Byers testified that she knew about this because many times, when a Nurse reported a write-up to her, that Nurse would tell her that the Nurse had already provided oral counseling to the Aide, and that nevertheless the Aide's misconduct had continued.

Byers also testified Nurses prepare write-ups on their own whenever a Nurse feels comfortable with knowing how to word the write-up and how to categorize the violation on the disciplinary form. Byers also testified that if a Nurse needed advice on how to word or categorize the write-up, the Nurse would come to her first. Byers said that after the discipline is written down, the document is given to the Unit Manager, or left in the Unit Manager's box if the write-up occurred during the weekend. Byers added that after that, she turns the document to the Director of Nursing Service, who then turns the document to the Administrator. Regarding the severity of discipline, Byers testified that neither she nor the Nurse doing the write-up have access to an employee's disciplinary

[12] The record is unclear as to when this new disciplinary form was created and introduced, or as to whether it will replace the older disciplinary forms.
[13] Oral warnings are also referred to in the record as oral counseling.

file to review any prior disciplinary history, and that those documents are accessed by the Director of Nursing Services and the Administrator, who make the decision regarding severity of discipline, sometimes in the presence of Byers.

Perry testified that verbal counseling can be on a written form just to track that there has been an episode of counseling or education. Perry said that beyond that, the next disciplinary measure would be a verbal warning, and then a written warning, noting that discipline forms contained a warning that further disciplinary action could be up to and including termination.

The Employer introduced at the hearing some disciplinary notices for Aides issued by Nurses. Myers testified that to the best of her recollection, the Nurses issuing those notices did not ask for approval from management before issuing those notices. Myers testified that she had initialed some of those documents because disciplinary notices need a co-signer as a witness. Myers said that the issuing Nurse also had the authority to determine the required level of discipline. Some of the disciplinary notices introduced, titled "Employee Performance Improvement Notification," had boxes to record the level of progressive discipline being issued: Verbal Warning, Written Warning, Final Written Warning, Suspension Pending Investigation, or Discharge. In addition, these forms had printed on the back page a list of 25 Rules of Conduct to be followed by employees.[14] The person issuing the discipline then would choose which one(s) of these Rules had been broken, and write it on the front of the form. None of the disciplinary notices introduced referenced specifically any previous disciplinary incidents as the basis for further discipline.

Byers testified at the hearing that she co-signed one of the disciplinary notices of an Aide issued by Shannon Tinoco, a Nurse, after Tinoco had contacted Byers and relayed the facts to her.[15] Byers said that she told Tinoco to write the Aide up, and discussed with Tinoco whether a verbal or written warning was warranted. Byers added that she was trying to encourage Tinoco to follow through because it was Tinoco's responsibility to supervise the Aides.

Griggs testified that she has the authority to write-up employees for disciplinary reasons, but noted that she usually talks to her Unit Manager first. Griggs recalled that in the 2-3 times in which she has done a write-up, the Unit Manager has asked her to bring the Aide to the Unit Manager's office to tell the Aide that the oral warning was going to be recorded, with the Unit Manager as a witness. Griggs testified that she did not know the outcome of the write-ups or whether they were considered during annual evaluations. However, Griggs testified that it was more common for her to provide verbal counseling to Aides,

[14] The language at the top of the list notes, however, that the Rules of Conduct are just examples of infractions, and that it is not possible to list all the forms of behavior that could result in disciplinary action.

[15] An Aide had finished his shift and left the facility without, among other things, showering a resident or getting her weight.

noting that she made the decision whether an Aide's fault was big enough to compel Griggs to talk to a Unit Manager about what should be done next. Griggs specifically identified one of the disciplinary documents introduced by the Employer as an incident in which she went to Byers' office to report that an Aide needed a verbal warning. Griggs said that Byers told her that verbal warnings had to be recorded in writing, and that was the reason why Griggs wrote the disciplinary note.

Hill testified that she had never been told by management that she had the authority to discipline Aides, and that she had never written anyone up because she never had an interaction with an Aide that required disciplinary action. Hill also testified that if an Aide was doing something that she did not like, she would talk to the Aide to correct her behavior. Hill noted that she thought she had the go-ahead from management to do that. Hill testified that if it was something that required more than just her talking to the Aide, she would go to the Unit Manager, and if the Unit Manager said to write up the Aide, she would do it. Hill also testified that if a resident had a complaint about a specific Aide, she would talk to the Aide and the resident to gather the details, and she would also talk to any potential witnesses, before reporting the incident to the Unit Manager. Hill noted however, that if the allegation involved harm to the resident, she would immediately separate the resident from the accused Aide.

Knoll testified that she has written-up Aides in the past, for reasons such as resident neglect, and abuse. Knoll identified at the hearing a disciplinary form which she had issued involving Aide Lisa Mowat back in October 2006. Knoll testified that she made the decision to write Mowat up and wrote the form on her own, noting that the disciplinary forms are located in the file cabinet on the nurse's desk. Knoll identified her handwriting on the document, and the fact that she had written "suspension if things don't improve" on it. Knoll noted that after that disciplinary form was issued, Mowat's performance improved. Knoll also testified that she had given up on issuing written warnings because her experience was that nothing was ever done with them, or at least she was unaware of any consequences. Knoll also testified that she would not initiate the process of writing someone up on her own, although she noted that she would do it if her Resident Care Manager told her to do so. Knoll added that she could not remember the last time she reported a disciplinary incident to her Resident Care Manager. Knoll also testified that on the weekends, if she had a disciplinary problem with an Aide, she would talk to the Aide first to try to solve the problem; however if that did not work she would call the Unit Manager or the Director of Nursing at their home to report the incident. Knoll noted that Nurses have the personal telephone numbers of almost all managing nurses for situations like this.

Habets testified that she has done 3 or 4 write-ups during her tenure with the Employer, although she noted that different Nurses have different styles, and that she didn't believe in write-ups and her style was to talk to the Aides to train

them and correct their behavior. She also testified that sometimes, if she noticed that an Aide was not responding to her training, she would tell Perry that such Aide could use some training, although Habets noted that beyond that, any training offered by the Employer was beyond her control. Habets said that she was unaware of any detrimental consequences falling on the Aides, like some kind of action beyond the write-up. Habets testified that if she had an issue with a Nurse she would explain the situation to the Director of Nursing or the Administrator, and sometimes they would tell Habets to write the Aide up, and sometimes they would directly talk to the Nurse. Habets also testified about an incident in which she told an Aide that it was inappropriate to wear sunglasses on top of her head at work. Habets testified that initially the Aide ignored her, and that when Habets insisted, the Aide yelled back at her and told her company policy did not prohibit wearing sunglasses. Habets said that she related the incident to her Unit Manager, who told her to leave it alone because no one else had a problem with it. Habets then bypassed her Unit Manager and related the incident to the Director of Nursing and the Administrator, who called the Aide to the Administrator's office to tell her to remove the sunglasses because it was inappropriate. Habets testified that the Administrator then asked her to write-up the incident because yelling back at Habets was insubordination, and Habets complied. Habets also testified that writing people up serves as a paper trail, so that in cases in which someone received multiple write-ups, some form of disciplinary action could be taken.

Ghislandi testified that the Nurse to whom he reports has the authority to give him directions during the day and to discipline him through oral or written warnings if he does not perform his duties without an explanation. Ghislandi testified that he has never been disciplined in the year he has spent working for the Employer, but he added that according to his understanding, if he received a verbal or written warning, he would receive a brief in-service session about what he did and what he needed to do to correct it.

Cummings testified that Nurses have the authority to discipline Aides, adding that she has been written up by Nurses in the past. Cummings said that for each disciplinary write-up she received counseling on the subject, noted that the she was shown the write-up paperwork before it was sent to the Unit Manager, and that each time the write-up only had the signature of the issuing Nurse. Cummings testified that other than the counseling, there were no other direct consequences for a recorded verbal warning or a written warning, but she also mentioned that a suspension with investigation was a possibility down the road.

With regard to the impact of disciplinary notices on the annual evaluation of Aides, Myers testified that oral warnings have the potential to affect the pay rate of an Aide because if the person doing the evaluation had knowledge that the Aide had received oral warnings, then that Aide would likely not receive an excellent grade in the category related to the warning. Myers added that

although all oral warnings should be documented in the employee files, some are not. With regard to the impact of written warnings, Myers testified that if a Nurse doing an evaluation could convince her that an Aide deserved an "Excellent" score in a category despite having written warnings related to that category, she would stand by that Nurse's decision.

C. Secondary Supervisory Indicia

The Employer, through Perry, the Staff Development Coordinator, provides regular in-service sessions for Nurses and Aides in order to educate them, among other things, as to new policies, or changes in medical procedures. Perry testified regarding a May 2007 in-service session for Nurses in which supervision of Aides was one of the topics of discussion. Hill testified that she did not have a specific recollection of that specific in-service session; however she recalled that at one in-service session Perry told the Nurses that they needed to make sure that Aides were doing their job properly. Knoll identified her signature on the sign-in sheet to that in-service session, and she testified that although she did not recall that specific session, if supervision of staff was listed as one of the topics in the sign-in sheet, the topic was likely discussed.

The Employer also introduced the sign-in sheet for an in-service session by Dianne Hart, one the Employer's Regional Nurse Consultants, which took place in February 2007. The sign-in sheet shows the "Uniform [Nursing] Disciplinary Act" as one of the topics of discussion. Hart testified that in that session she discussed supervisory responsibilities with Nurses, telling them that they were accountable for the actions of Aides, and that they had to provide disciplinary action as appropriate. Knoll identified her signature on the attendance sheet for that session; however, she could not recall any details regarding that session, and could not specifically recall any discussion of the need of nurses to supervise their staff, or how one of the recurring causes of nursing malpractice liability was a failure to adequately supervise patients. Habets also identified her signature on the attendance sheet for that session, and noted that the meeting was only for Nurses. Habets testified that she recalled portions of the session, including being told, among other things, that the care of residents ultimately fell on Nurses, that the completion of tasks delegated to Aides ultimately fell on Nurses, that Nurses needed to supervise their subordinates, that Nurses needed to write-up an Aide doing something wrong and that Nurses had the authority to do so, and that Nurses had to use their own professional judgment to determine how residents are to be cared for.

Perry is also in charge of facility orientation for new employees. Perry testified that during orientation new employees are informed of the particular chain of command, and how Nurses are the immediate supervisors of Aides, and how Nurses are responsible for the amount of care residents receive, and how they should assign duties as things change during the shift. Hill and Knoll

testified that they could not specifically recall being informed of this at their orientations.

III. LEGAL ANALYSIS

Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006), the Board, citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), iterated its three-part test, which finds individuals to be statutory supervisors if:

(1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11);

(2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and

(3) their authority is held "in the interest of the employer."[16]

The Board has also established that the burden to prove supervisory authority, by a preponderance of the evidence, is on the party asserting it. *Croft Metals, Inc.*, 348 NLRB 717, 721. (2006). See also *Loyalhanna Health Care Associates t/d/b/a Loyalhanna Care Center*, 352 NLRB No. 105 (2008). "Purely conclusory" evidence is not sufficient to establish supervisory status; and a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). To qualify as a supervisor, it is not necessary that an individual possess all of the criteria specified in Section 2(11), instead, possession of any one of them is sufficient to confer supervisory status. *Lakeview Health Center*, 308 NLRB 75, 78 (1992). Finally, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that

[16] The Supreme Court in *NLRB v. Health Care & Retirement Corporation of America*, 511 U.S. 571 (1994) held that "[s]ince patient care is a nursing home's business, it follows that attending to the needs of patients, who are the employer's customers, is in the employer's interest." Accordingly, this decision will focus its analysis on the first 2 prongs (supervisory criteria and independent judgment) of the *Oakwood* test.

supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

A. Relevant Supervisory Criteria

1. Evaluations

a. The Nurses' Evaluations Do Effect Wage Increases

Section 2(11) of the Act "does not include 'evaluate' in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employees being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." *Harborside Healthcare*, 330 NLRB 1334 (2000). On the other hand, supervisory status is present when a purported supervisor evaluates employees using specific, well-defined criteria, and such evaluations have a direct effect on the evaluation results and terms of employment, such as wages, of evaluated employees. For example, in *Bayou Manor Health Center, Inc*., 311 NLRB 955 (1993), the Board concluded that LPN's were supervisors because they evaluated CNA's using numerical criteria which directly determined the percentage of wage increase for that CNA. See also *Westwood Health Care Center*, 330 NLRB 935 (2000); *First Healthcare Corporation d/b/a Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997); and *Health Care & Retirement Corp.*, 310 NLRB 1002 (1993).

The Employer argued in its brief, based on *Bayou Manor*, *Health Care & Retirement*, and *Westwood*, that the Nurses here are statutory supervisors because there is a direct correlation between the evaluations Nurses complete and the wage increases Aides receive. The record here indicates that the Nurses' evaluation scores are translated into numerical values which determine the wage raise received by the Aide being evaluated.[17] The record also contains testimony from Nurses indicating that Nurses evaluate Aides based on their own uninfluenced opinion. I find, based on such evidence, that whenever a Nurse evaluates an Aide, that evaluation directly determines that Aide's percentage of wage increase. This direct link between evaluations and wage increases also allows me to differentiate the facts here from *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999) and *Hospital General Menonita v. NLRB*, 393 F.3d 263, 267-68 (1st Cir. 2004), cases relied on by the Petitioner in its brief, because in those cases there was no clear link between the evaluations and oral reports performed by the alleged supervisors and any wage increases.

[17] I note, however, that in many of the examples of evaluations introduced at the hearing, mathematical errors were present in the calculations, which in some cases gave the evaluated Aide an increase different from what would have been expected.

The Petitioner also argues, based on *Bayou Manor*, supra; *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); and *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139-40 (1999), that the evaluations performed by the Nurses here are not evidence of supervisory status because the evaluations are not the sole product of the Nurses. Nurses Hill and Knoll testified that they do not fill out the entire evaluation. For example, they do not fill out anything related to work attendance because they do not have access to those records. I acknowledge the appearance that other individuals fill out the objective criteria in the evaluations of the Aides. Such criteria represent 2 of the 6 final numerical scores which are ranked and which together constitute the points on which any wage increase is calculated. Nevertheless, I find that, unlike *Bayou Manor*, *Ten Broeck Commons*, or *Vencor Hospital*, a direct link between the Nurses' role in the evaluations and wage increases for the Aides is still present here, because the Nurses ultimately fill out all of the subjective criteria (the categories in the "duties and responsibilities" section of the evaluation) and these criteria directly impact the wages of the Aides. In addition, I note that the record here contains no evidence of any changes being made to evaluations by management after the fact, which allows me to further differentiate the facts here from those in *Ten Broeck Commons*.

Based on the circumstances described above, I find that whenever a Nurse performs an Aide's annual evaluation, that evaluation directly has an impact on the percentage of wage increase for that Aide. However, I reject the Employer's contention that on this basis alone, the Nurses are supervisors, because, as described below, I find that the Nurses' role in the annual evaluations is neither regular nor substantial.

b. The Nurses' Role in the Annual Evaluations is Neither Regular nor Substantial

The Board has expressed that when a regular rank-and-file employee spends only a portion of his time performing supervisory duties, as for example evaluating other employees, the regularity and substantiality of those duties are of utmost importance. *Oakwood Healthcare*, 348 NLRB at 694. In *Oakwood*, the Board ruled that where an individual is engaged part of the time as a supervisor and the rest as a unit employee, the legal standard is whether the individual spends a regular and substantial portion of the work time performing supervisory functions. The Board explained that "regular" means according to a pattern or schedule, as opposed to sporadic substitution. *Id*. For its finding on regularity, the Board relied on *St. Francis Medical Center West*, 323 NLRB 1046, 1046-47 (1997), in which an employee was not found to be a supervisor when he only assumed supervisory duties while the actual supervisor was on medical leave for a few months. With regard to substantiality, the Board in *Oakwood* explained that it had not adopted a strict numerical test, but that it had found supervisory status where individuals had served in a supervisory role for at least 10-15 percent of their total work time. *Oakwood Healthcare*, 348 NLRB at 694.

With respect to the issues of regular and substantial, I note that Myers testified that the Employer had made an attempt to present at the hearing all of the Aides' annual evaluations performed by non-managerial Nurses over the past 2 years.[18] The record contains 16 Aides' evaluations performed by 5 or 6 Nurses (roughly 20-25 percent of the total of 25 Nurses) over the past 2 years. Although the record contains no evidence of the total number of evaluations in the Aides' unit over the 2 year period, I note there are approximately 58 Aides employed by the Employer. Under the circumstances, it is reasonable to assume that 16 evaluations over a 2 year period (even factoring in turnover) represent a small portion of the total number of Aides' evaluations during that period.

In this regard, Nurse Hill testified that she has done 4 or 5 evaluations during her tenure of employment. However I note that from the record Hill has apparently only done one over the past 2 years. In addition, while Wilder, the Sub-Acute Unit Manager, testified that she typically delegates evaluations to her Nurses, Byers, the Manager for the Long-Term Unit, testified that she usually does Aides' evaluations because they are very time consuming and this would burden the Nurses. Myers similarly testified that Unit Managers likely do most of the annual evaluations. Finally, the record did not reveal a formal system for a regular assignment of evaluations among all Nurses, and the testimony of some Nurses and the record evidence indicated that they have never performed annual evaluations.

Based on the record evidence and testimony, and although it is not possible to express with a precise percentage, I find it reasonable to presume that only a small portion of the annual Aides' evaluations are performed by Nurses. I also note that the record shows that for the most part, Nurses are engaged in direct patient care responsibilities which are non-supervisory. Under the circumstances, I find that the Nurses' role when evaluating the Aides is the functional equivalent of a situation in which an ordinary rank-and-file employee substitutes for a supervisor for the performance of limited and sporadic short-term tasks, and that the *Oakwood* test for employees substituting for supervisors applies to this discrete function.

Applying the *Oakwood* test for employees substituting for supervisors, I conclude that the Nurses do not perform evaluations on such a regular and substantial basis as to support a finding of supervisory status. Regarding regularity, the first prong of the *Oakwood* test, I note that the assignment of evaluations appears to be done on an infrequent and random basis, and that in fact, an overwhelming majority of Nurses are never assigned and never prepare evaluations. Regarding substantiality, the second prong of the *Oakwood* test, I note that in the cases of the few Nurses who performed evaluations, such duties were unlikely to constitute a substantial portion of the total working time of those

[18] The Employer clarified at the hearing that they had only reviewed files from Aides employed by the Employer as of the time of the Petition.

Nurses, especially considering that the evaluations require no narrative and consist of checking about 45 boxes on a form.

I acknowledge in my finding the testimony of Byers stating that the evaluations are "time-consuming." However, considering that the record contains no further testimony or evidence quantifying such general statement from Byers, I find that the time spent by a few Nurses' doing sporadic evaluations could not account for 10-15 percent of those Nurses total working time and thus fails to meet the "substantiality" prong of the *Oakwood* test.

Based therefore on the record evidence and pursuant to the rationale of *Oakwood*, supra, I find that the Nurses do not perform evaluations regularly; rather, evaluations are performed randomly and sporadically by a limited number of Nurses. In addition, the limited number of Nurses who perform evaluations do not spend a "substantial" amount of their work time performing those duties. Under such circumstances, the Employer has failed to meet its burden of demonstrating that the Nurses' role in evaluations warrants a conclusion that they are statutory supervisors.[19]

2. Assign & Responsibly Direct

"Assignment" is defined as the "giving [of] significant overall duties, i.e., tasks, to an employee"; "significant overall duties" do not include "ad hoc instructions to perform discrete tasks." *Oakwood Healthcare*, 348 NLRB at 689. In addition, assignment also includes "designating an employee to a place (such as a location, department, or wing), [and] appointing an employee to a time (such as a shift or overtime period)." *Id*. However, working assignments made to equalize work among employee's skills, when the differences in skills are well known, are routine functions that do not require the exercise of independent judgment. *Providence Hospital*, 320 NLRB 717, 727, 731 (1996), overruled in part by *Oakwood Healthcare*, 348 NLRB at 686, fn.29.

It is also well established, that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that certain action be taken; supervisory authority is not established where the putative supervisor merely has the ability to request that a certain action be taken. *Golden Crest*, 348 NLRB at 729, *citing Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001). Further, assignment of work through a consensus of those that will be affected by the assignment does not meet the additional criteria of independent judgment. *Hospital General Menonita v. N.L.R.B.*, 393 F.3d 263, 267 (1st Cir. 2004).

[19] With regard to skill audits or any informal verbal feedback on the performance of Aides provided by the Nurses to the Unit Managers, I note that nothing in the record indicates that they have an impact on the wages or tenure of the Aides, and that the Employer did not argue otherwise in its brief.

Based on the examples discussed below, the difference between assignment versus direction appears to be the complexity and duration of the task at issue. This distinction is reinforced by the fact that "assign" also includes designating an employee to a place (e.g. a wing), and appointing an employee to a time (e.g. an overtime period). By nature, these types of assignments go beyond requiring an employee to only perform a discrete task.

a. Assignment of Significant Overall Duties

In the health care setting, charge nurses assign work when they "designate [ ] an LPN to be the person who will regularly administer medications to a patient or group of patients," but not when they order "an LPN to immediately give a sedative to a particular patient." *Oakwood Healthcare,* 348 NLRB at 689. Charge nurses also assign work when "[a]t the beginning of each shift, [they] assign the staff working the unit to the patients they will care for over the duration of the shift." *Id*. at 695.

On the other hand, ad hoc instructions to perform discrete tasks are "direction." *Id*. at 689. Direction is present when an individual has rank and file employees under him or her and decides what job shall be undertaken next or who shall do it. *Id*. Thus, charge nurses at a nursing home are directing discrete tasks, not assigning overall duties, when they instruct CNA's to bathe residents, clip residents' toenails and fingernails, empty catheters, or change an incontinent resident. *Golden Crest*, 348 NLRB at 730. Similarly, in a manufacturing setting, lead persons who worked along side their crew members engaged in "direction" rather than assignment where they occasionally switched tasks among the employees, directed employees to ensure that projects were completed on a timely basis, and told replacements what jobs to perform and switched other employees' jobs accordingly. *Croft Metals,* 348 NLRB at 721-22. In addition, the lead persons did not post work schedules or appoint employees to production lines or overtime and the lead person's supervisor selected any replacements and decided how long they would stay. *Id*. The occasional switching of jobs among employees "more closely resemble[d] an 'ad hoc instruction that the employee perform a discrete task' during the shift" than it did the assignment of significant overall duties. *Id*.

Here, the Employer has placed significant weight on the fact that the Nurses create and update Care Plans and Activities of Daily Living charts. However, I note from the onset that the Board has found that the completion of care plans by nurses and physicians is not equivalent to assignment when there is an assumption that any aide can perform the work. *Franklin Hospital*, 337 NLRB 826, 830 (2002). In addition, the record here contains no evidence showing what percentage of the entries into the Care Plans and Activities of Daily Living charts are done independently by the Nurse, and what percentage are done pursuant to someone else's orders. Considering also the fact that Care Plans and Activities of Daily Living charts are not directed to individual Aides, but

instead are directed to all Aides (and Nurses, in the case of Care Plans) who care for a resident, I find that the direction given to the Aides through the Care Plans and Activities of Daily Living charts are of the discrete type which *Golden Crest* described as direction rather than assignment.

With regard to interaction, the record appears to indicate that most of the direct interaction between Nurses and Aides consists of Nurses directing Aides to report on the condition of some residents, and of Nurses asking Aides for help with certain procedures, such as the change of an intravenous dressing. I find that these directions constitute ad hoc instructions to perform discrete tasks, and under *Oakwood* this is not assignment but rather direction. Similarly, with regard to situations of understaffing, I find that the record appears to support the conclusion that these situations are usually resolved through a consensus between Nurse and Aides, and under *Hospital General Menonita* that is not considered a supervisory assignment because it is done without independent judgment.

The Employer noted in its brief that Nurses are the only on-site supervisors present at the facility from 7:00 p.m. to 7 a.m. However, the Board recently reaffirmed the principle that service as the highest-ranking employee on duty is secondary indicia which, by itself, is insufficient to prove supervisory status. *Loyalhanna Care Center*, 352 NLRB No. 105, slip op. at 3, citing *Golden Crest*, 348 NLRB 727. I also note the testimony of Knoll indicating that Nurses can always call management at home during those hours, which further undercuts any Employer's argument based on the Nurses' service as the highest-ranking employee on duty during that time. *Loyalhanna Care Center*, 352 NLRB No. 105, slip op. at 3 (2008), citing *Golden Crest*, 348 NLRB 727, fn.10.

Based on the evidence and reasons given above, I find that the Employer has not met its burden to prove that the Nurses assign the Aides to significant overall duties, and instead find that the Nurses' assignment of discrete tasks among the Aides more closely resembles "direction." Below, I will analyze whether the Nurses are directly accountable for these directions in order to meet the standard of "responsibly direct."

b. Assignment to a Place

The 2(11) function of "assign" includes "designating an employee to a place," such as a department or wing or even a specific defined location within a department, such as an area within an emergency room. *Oakwood Healthcare*, 348 NLRB at 689, 695. Such assignments are of the types that "determine what will be required work for an employee during the shift, thereby having a material effect on the employee's terms and conditions of employment." *Id*. at 695.

Here, the record shows that Aides are assigned to a particular Unit (Long-Term or Sub-Acute) based on a daily schedule created by management, without any apparent intervention by the Nurses. In addition, Aides also get assigned to particular rooms within a Unit through the assignment sheets. The record is unclear as to who creates these assignment sheets on a daily basis. Cummings testified that assignment sheets are created by Nurses, while Favre and Hill testified that assignment sheets were often created by the Aides themselves. The record is similarly unclear regarding any changes to assignment sheets in the middle of a shift. For example, in the case of an understaffed shift; Byers testified that a Nurse can either ask the Aides to switch rooms, or a Nurse can simply assign Aides to switch. Nonetheless, I find that the record appears to indicate that assignment sheets are often created and updated through a consensus of those who will be affected by the assignment. As noted above in *Hospital General Menonita,* assignment using consensus does not constitute assignment using independent judgment.

Based on the evidence and reasons given above, I find that the Employer has not met its burden to prove that the Nurses are statutory supervisor by assigning Aides to a place.

c. Assignment to a Time

The 2(11) function of assign includes the authority to "appoint [ ] an employee to a time (such as a shift or overtime period)." *Id*. at 689. However, the authority to verify and initial employee timecards is considered a routine and clerical task that does not indicate supervisory authority. *Golden Crest*, 348 NLRB at 730, fn.10. Further, "supervisory authority is not established where the putative supervisor has the authority merely to request" that employees stay beyond the end of their shifts or come in to work when requested. *Id*. at 729 (emphasis in original).

Here, the testimony of Byers, Hill, and Knoll appear to show that, with regard to missed meals, the Nurses are merely verifying and initialing a slip indicating that the Aide missed a meal, in a manner similar to what *Golden Crest* refused to accept as evidence of supervisory status. I also note that there is no evidence in the record showing that the Nurses actually assigned the Aide to work during meal time. Without such evidence, I cannot find that the Nurses assign the Aides to a time whenever they sign a slip evidencing a missed meal.

With regard to overtime, the testimony of all witnesses, including Employer's witnesses, appear to indicate that the Nurses occasionally ask the Aides to work past their shift; however, Nurses cannot compel an Aide to work past that Aide's shift. As the Board explained in *Golden Crest*, the authority to merely request that employees stay beyond the end of their shifts is not indicative of supervisory status.

Based on the evidence and reasons given above, I find that the Employer has not met its burden to prove that the Nurses are statutory supervisors by assigning Aides to a time.

d. Responsibly Direct

Above, I found that the Employer had not met its burden to prove that the Nurses assign the Aides to significant overall duties, and instead found that the Nurses' assignment of discrete tasks among the Aides more closely resembled "direction." I will now analyze whether the Nurses are directly accountable for these directions in order to meet the standard of "responsibly direct."

A difference between assignment and responsible direction exists with regards to accountability: the 2(11) function of assign can exist even when the putative supervisor is not accountable for how the staff performs their assignments. In contrast, the 2(11) function of "responsibly to direct" only exists when the putative supervisor is "accountable" for the proper performance of the task by other employees. *Oakwood Healthcare*, 348 NLRB at 692. Accountability is established where putative supervisors have the authority to take corrective action and are subject to adverse consequences for the performance of their staff. *Id*.

However, the requisite showing of accountability is not present where the putative supervisor is disciplined because of his or her own inadequate performance. Rather, the requisite showing is present only when the putative supervisor satisfactorily performed his or her own duties but nevertheless is disciplined because the staff failed to properly perform their tasks. For example, lead persons in a manufacturing setting were held accountable where they received written warnings because their crews failed to meet production goals. *Croft Metals*, 348 NLRB at 722. On the other hand, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. *Oakwood Healthcare*, 348 NLRB at 695. Here, in contrast to *Croft Metals*, there is an absence of evidence that the Nurses are subject to discipline or other immediate consequences for the actions of Aides who are under their direction.

With regard to putative supervisors being periodically evaluated on their direction of employees, in *Golden Crest*, 348 NLRB at 731, the Board required evidence that an alleged supervisor's evaluation for direction of subordinates had, by itself or in combination with other evaluation factors, an effect on that person's terms and conditions of employment. The Board explained that such effect could be positive, like a merit increase, bonus, or promotion; or negative, like a denial of one or more of the foregoing, or some form of counseling or discipline. *Id*. at fn.13. The Board however cautioned against basing a finding of supervisory status on evidence of "paper accountability" and found in that case

that the evaluations of nurses alone, without any evidence of effect on terms and conditions of employment, could not support a supervisory finding. *Id*. at 731.

The Employer argued in its brief that Nurses responsibly direct the Aides because Nurses are annually evaluated on their direction of Aides and those evaluations determine the amount of a wage increase, if any. Here, the annual evaluations of Nurses are based upon their performance of 68 duties. For each duty, the evaluator checks a box rating that Nurse, as "Excellent", "Good", "Fair", or "Poor." On the final section of the evaluation, duties are grouped into 7 categories; Administrative, Personnel, Safety, Staff Development, Resident Care, Attendance, and Tardiness. The largest category is Administrative, which covers a total of 33 duties. The most prevalent mark in each category is then converted into a numerical value (ranging from three for an "Excellent" to zero for a "Poor") which becomes the score for that category. For example, if a Nurse has 23 "Excellent" marks and 10 "Good" marks in the duties under the Administrative category, that Nurse would get a 3 in that category because Excellent was the most prevalent mark. At the end of the evaluation, the numerical average of all categories is computed, and that number determines the percentage of annual wage increase for that Nurse.

More specifically, the Employer argued that nine of the duties on which Nurses are annually evaluated encompass tasks related to direction of Aides. I note initially that the record contains no discussion of the scope of responsibilities associated with each of the listed duties. However, it appears that one of the duties listed by the Employer appears to fully fit the tasks involved in directing of Aides. This duty ("direction of Aides") is one of the 33 duties contained in the Administrative Functions category. It states that Nurses must "oversee[] the day-to-day functions of assigned personnel for the purpose of ensuring that appropriate nursing services are provided to each resident in accordance with the assigned employees' job descriptions, policies and procedures, and individualized resident care plans." With regard to the other 8 duties the Employer claimed were related to direction of Aides, I find that they more accurately describe personnel and clerical functions. In addition, I note that it would appear redundant to evaluate a Nurse on their direction of Aides in nine separate sections of their evaluations.

Based on the above, it appears that the evaluation a Nurse obtains on the "direction of Aides" duty could arguably have an impact on that Nurse's wage raise. Further, such effect could constitute the type of evidence the Board described in *Golden Crest* for a finding of responsible direction. However, as I noted above, the "direction of Aides" duty is only one out of 33 duties contained in the Administrative category. I further note that the only situation in which such a duty could make a difference in the Administrative category score would involve a tie between 2 scoring marks (for example, 16 "Excellent" marks and 16 "Good" marks). Only in such rare scenario could the "direction of Aides" score potentially affect the final score of the Administrative category, acting as the tie-

breaker. Indeed, I note that in none of the 18 Nurses' evaluations introduced at the hearing, was such an unlikely tie scenario present, and in fact, in a majority of those evaluations the scoring marks in the Administrative category were always heavily concentrated under either "Excellent" or "Good."

Furthermore, I note that the Administrative category is only one of 7 categories averaged to determine the final percentage of wage increase. This makes the impact of the score on the "direction of Aides" duty even more negligible. Finally, many of the evaluation examples in the record contained mathematical errors, which in some cases gave the evaluated employee an increase different from what would have occurred under the system as written. As a result, I find it even less likely that a score in any particular duty, such as "direction of Aides", would have a significant impact on an overall evaluation or wage increase. I would reach the same conclusion even if it was determined that 2 or 3 duties on which the Nurses are evaluated include an assessment of their direction of Aides as even then the same considerations would prevail. Based on the above, I conclude that the Nurses' evaluations in the "direction of Aides" duty have merely a de minimis or speculative impact on the Nurses' conditions of employment and accordingly they fail to support a conclusion of accountability pursuant to *Golden Crest*, supra.

With regard to the Nurse who received low evaluation marks on direction for not updating a Care Plan and an Activities of Daily Living chart, I note, based on my finding above, that any low score that Nurse received on "direction of Aides" had a negligible impact on that Nurse's wage increase. Similarly, I acknowledge the testimony of Byers indicating that she warned that same Nurse of a potential write-up if her direction of Aides did not improve. However, I note that the Employer did not present any actual evidence of a warning ever being issued for that cause. Furthermore, I emphasize that such a situation would be akin to the example in *Oakwood Healthcare*, thus illustrating a Nurse failing to do her job (updating the Care Plan) rather than an Aide failing to do her job (following a Care Plan properly updated by a Nurse), and under *Oakwood* that is insufficient to demonstrate the accountability required for responsible direction.

Finally, I also acknowledge the testimony of Knoll stating that sometimes Nurses instruct male Aides to attend heavy residents who could be difficult transfers. I note initially that instructions related specifically to the transfer of residents are the type of "ad hoc" discrete tasks directions the Board in *Oakwood* found to be direction rather than assignment. Furthermore, I note that the differences on strength between male and female Aides is a well known fact, and under *Providence Hospital*, supra, an instruction based on such facts or reasons does not require the use of independent judgment and therefore can not support a finding of supervisory status.

Based on the evidence and reasons given above, I find that the Employer has failed to meet its burden to prove that the Nurses responsibly direct the work

of the Aides because evidence showing that the Nurses are accountable for the work performance of the Aides, is so de minimis that if fails to meet the standard set forth in *Oakwood* and *Golden Crest*.

3. Discipline

The Board recently reaffirmed that actual authority to discipline, rather than "paper authority" is necessary to establish supervisory status. *Loyalhanna Care Center*, 352 NLRB No. 105, slip op. at 4, citing *Golden Crest*, 348 NLRB 727. The power to point out and correct deficiencies in the job performance of other employees is insufficient to establish that an employee is a supervisor under Section 2(11) of the Act. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). In addition, an employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will effect employees' job status. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Rather, to confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel. *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001).

In cases involving a system of progressive discipline, however, even warnings which do not lead to direct and immediate adverse consequences can still be disciplinary in nature if they pave the way for future disciplinary action. In *Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center*, 351 NLRB No. 9, slip op. at 4 (2007), the Board found that counseling forms completed by Nurses constitute a form of discipline, even if such forms do not lead to immediate consequences, because such forms can lay out the foundation for future discipline. Similarly, in *Promedica Health Systems*, 343 NLRB 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), the Sixth Circuit found a direct link between recorded verbal coachings and future disciplinary action. See also *Progressive Transportation Systems, Inc*., 340 NLRB 1044, 1046 (2003) (written discipline notices issued by purported supervisor relied on and specifically referenced by management when administering subsequent discipline).

The Employer argued in its brief, based on *Berthold* and *Promedica*, that counseling forms issued by Nurses are a form of discipline because they lay out a foundation, under the Employer's progressive discipline system, for future discipline. The Employer also argued in its brief that each offense would automatically result in an application of the next step of progressive discipline. I, however, find the facts here distinguishable from those in *Berthold* and *Promedica*.

In *Berthold* the Board specifically noted that its decision was based on specific examples of effective progressive discipline produced by the employer in

that case. Here, the record contains no examples of written warnings paving the way for future disciplinary action under the Employer's progressive discipline policy. Rather, I note that in some of the written warnings produced here, the subsequent warnings of certain employees did not appear to "progress" to the next disciplinary level, which would be the case if a progressive discipline policy was firmly in place. Such circumstance contradicts the Employer's claim that progressive discipline here is automatic. Similarly, in *Promedica*, the employer's own written policy evidenced a direct link between recorded verbal coachings and any future disciplinary action.

While the Employer's witnesses testified that there is such a direct link, the written policies here are ambiguous and there is insufficient evidence that the Employer carried out such a policy. In this regard, I note that the Employer's own progressive disciplinary policies introduced at the hearing state that such policies *may* not necessarily be followed at all times. In fact, the evidence demonstrated that the Employer did not carry out such policies. Considering this evidence of a lack of a direct link, I find that disciplinary notices issued by Nurses do not effect any immediate or future discipline on the Aides.

In the alternative, the evidence as a whole of a direct link between disciplinary noticed issued by the Nurses and immediate or future discipline of the Aides is too inconclusive to establish supervisory authority on that basis. *Phelps Community Medical Center*, 295 NLRB at 490-91.

The Employer also argued in its brief that the Nurses were statutory supervisors because they escorted Aides out of the building for insubordinate behavior without getting approval from superiors. The Employer specifically cited in its brief a situation in which Wilder (back during the time in which she was a regular Nurse) escorted an Aide out of the Employer's facility for verbally confronting and cursing at another Nurse. I note, however, that the Board has found that when authority to send employees home is limited to flagrant employee conduct, such authority does not constitute statutory supervisory authority. *Phelps Community Medical Center*, 295 NLRB at 491-92. Here, Byers, the Long-Term Unit Manager, confirmed in her testimony that Nurses have the authority to escort employees out of the building in outrageous circumstances. Considering that the provided example of an Aide cursing at a Nurse likely falls under the outrageous circumstance rule, I find that such authority fails to constitute sufficient support for a finding that Nurses are statutory supervisors.

The Employer also argued in its brief that Nurses have been consistently told, particularly through in-service counseling sessions, that they have the authority and are required to initiate the disciplinary process. To support its argument, the Employer relied on *Riverchase Health Care Center*, 304 NLRB 861, fn. 9 (1991) which holds that it is the possession of supervisory power rather than its exercise that determines supervisory status. I note however, that in

Riverchase Health the Board added that the Employer had the burden to establish the possession of such authority. Also in *Riverchase Health,* although the Board found that the LPN's possessed the authority to issue oral and written warnings, the Board ultimately concluded that there was no evidence of any nurse aides ever being suspended or terminated as a result of accumulated employee memoranda and therefore a lack of such evidence required a non-supervisory finding. Therefore, despite the Employer's assertions, even in *Riverchase Health,* the Board still required evidence of disciplinary notices having an immediate or future effect on employees.

Furthermore, in *Chevron, U.S.A., Inc*., 309 NLRB 59, 61-62 (1992), the Board explained, citing *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976), that supervisory status is to be determined in light of the employee's actual authority, responsibility, and relationship to management. More specifically, in *Chevron Shipping Co.,* 317 NLRB 379, 381, fn. 6 (1995) the Board noted that conclusory statements without supporting evidence do not establish supervisory authority. I acknowledge in my decision the testimony of some Nurses recalling in-service sessions in which they were told about their role in the disciplinary process. However, considering my finding above that disciplinary notices issued by Nurses do not effect any immediate or future discipline on the Aides, and based on *Advanced Mining Group*, I can not find that statements by management at in-service sessions can alone support a finding that Nurses are statutory supervisors.

I acknowledge the testimony suggesting that Nurses exercise independent judgment on the issuance of disciplinary notices, as well as the testimony suggesting that Nurses warn Aides of potential consequences if performance is not improved. However, based on the record testimony and evidence, I find that the Employer has failed to prove a direct linkage between disciplinary notices, such as counseling forms, issued by Nurses and any immediate or future discipline. This in turn leads me to conclude that the Nurses are not statutory supervisors because of their role in the Employer's disciplinary system.

B. Secondary Supervisory Indicia

Secondary indicia, including an individual's job title or designation as a supervisor can only be used to determine supervisory status when evidence of primary indicia is present. *Avante at Wilson, Inc*., 348 NLRB 1056, 1061 (2006). Here, the record appears to indicate that the Nurses were informed at an in-service session, that one of their job responsibilities was to supervise the work of the Aides, and that the Nurses were liable for the work performance of the Aides. As I have found above that the Nurses do not possess or exercise supervisory indicia, I find that this alleged secondary evidence is insufficient for a finding of supervisory status.

IV. CONCLUSION

Based on the above and the record as a whole, I conclude that the Registered Nurses and Licensed Practical Nurses are not statutory supervisors because they do not assign, responsibly direct, or discipline the Registered Nursing Assistants or Certified Nursing Assistants using independent judgment and because their role in evaluating the Aides is neither regular nor substantial.

As for the appropriate unit in this case, the Employer argued that a combined unit of RN's and LPN's would be preferable to separate units of RN's and LPN's. Although Petitioner initially filed these Petitions intending to represent the RN's and LPN's in separate units, on brief, Petitioner expressed a willingness to include the RN's and LPN's together in the same unit based, in part, on its putative "concession" that the RN's are not professional employees. Significantly, however, at hearing the parties did not stipulate as to the professional status of the RN's or take definitive positions based on meaningful facts or full litigation concerning the RN's professional status.

In resolving the unit issues in this case, I first note that the record contains sufficient evidence to support a finding that one possible appropriate unit in this matter would consist of a combined RN and LPN unit. This follows primarily because, as noted above, both employee classifications perform essentially the same job functions and, as such, the RN's and LPN's share common, vital interests as employees. Final resolution of the unit issue, however, does not end there.

In resolving the ultimate unit determination here, I must also consider the Board's teachings in *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999) which concern application of Section 9(b)(1) of the Act. Such Section mandates that professional employees must consent to their inclusion in a unit with non-professional employees. In short, without either 1) clear record evidence that the disputed employees lack the professional indicia listed in Section 2(12) of the Act, or 2) a factually supported stipulation by the parties that the involved employees do not possess professional status, I am compelled to extend the potential professional employees a choice of units, i.e., the choice of representation in a unit by themselves, or in a unit combined with the remaining employees.

I conclude that the above principles are controlling here. This follows as I specifically find that Section 9(b)(1) applies to this case because the Board's traditional view is that RN's are presumptively professional employees within the meaning of Section 2(12). *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975). Although such traditional presumption may be rebutted, I find that such has not been done in this case. This is so because, as I have mentioned, the matter was not definitively litigated at the hearing and, as a result, there is insufficient rebuttal evidence to find a lack of professional status on this record.

In addition, the parties never proffered a factually supported stipulation that the RN's here lack Section 2(12) status. In summary, having found the combined unit of the RN's and the LPN's could be an appropriate unit, and in view of the unrebutted presumption of RN's professional status, I shall, pursuant to the Board's decision in *Sonotone Corp*., 90 NLRB 1236 (1950), direct separate elections in Voting Groups A and B. The RN's in this case are hereby designated as "Voting Group A" and shall be given a unit choice. Correspondingly, the LPN's are designated as "Voting Group B."

Therefore, in conformance, with Section 9(b)(1), I shall seek the RN's (i.e. Voting Group A's) consent before including them in a combined unit. As a result, Voting Group A will be presented two questions:

1. Do you desire to be included in the same unit as nonprofessional employees employed by the Employer for the purposes of collective bargaining?

2. Do you desire to be represented for the purposes of collective bargaining by International Association of Machinists & Aerospace Workers, District Lodge W-1, AFL-CIO?

The ultimate determination as to the appropriate unit or units is based on the result of Voting Group A's response to the first question. Thus, I make the following findings with regard to the possible appropriate units:

1. If a majority of the employees in Voting Group A vote for inclusion in a unit with the employees of Voting Group B, I find the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Registered Nurses and Licensed Practical Nurses employed by the Employer at its Montesano, Washington facility; excluding all Certified Nursing Assistants, Registered Nursing Assistants, directors, managers, and guards and supervisors as defined in the Act.

2. If a majority of the employees in Voting Group A do not vote for inclusion in a unit the Employees of Voting Group B, I find the following two units to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> UNIT 1:
>
> All full-time and regular part-time Registered Nurses employed by the Employer at its Montesano, Washington facility; excluding all Licensed Practical Nurses, Certified Nursing Assistants, Registered Nursing Assistants, directors, managers, and guards and supervisors as defined in the Act.

UNIT 2:

All full-time and regular part-time Licensed Practical Nurses employed by the Employer at its Montesano, Washington facility; excluding all Registered Nurses, Certified Nursing Assistants, Registered Nursing Assistants, directors, managers, and guards and supervisors as defined in the Act.

If a majority of the employees in Voting Group A vote yes to the first question, indicating their desire to be included in a unit with employees in Voting Group B, they will be so included. Their vote on the second question will then be counted with the votes of the votes of the employees in Voting Group B to decide the representative for the combined bargaining unit. If, on the other hand, a majority of the professional employees in Voting Group A do not vote for inclusion, they will not be included with the employees in Voting Group B and their votes on the second question will be separately counted to decide whether or not they wish to be represented by the Petitioner in a separate professional unit.

V. DIRECTION OF ELECTION

Separate elections by secret ballot shall be conducted by the undersigned among the employees in the Unit at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit and voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE W-1, AFL-CIO.**

A. List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994).

In order to be timely filed, such list must be received in Region 19 of the National Labor Relations Board, Jackson Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174 on or before **……, 2008.** No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in

Washington by **August 13, 2008**. The request may be filed through E-Gov on the Board's web site, www.nlrb.gov, but may not be filed by facsimile.[20]

DATED at Seattle, Washington, this July 30, 2008.

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

[20] To file a request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.